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85-275

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CARLOS G. GAY

Petitioner,

V.

COATS & CLARK, INC.
and
THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
and
WHIRLPOOL CORPORATION
and
ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY

Respondents,

On Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

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RESPONSE OF WHIRLPOOL CORPORATION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Certiorari should be denied because this case presents no issue for review by this Court as the Eleventh Circuit Court of Appeals correctly applied the plain error standard of review. The plain error standard of review is uniformly accepted and applied by all federal courts of appeal as the proper standard of review when no contemporaneous objection is made at the time of trial. The Eleventh Circuit applied the plain error doctrine to the record as a whole and concluded that reversal was not appropriate. No conflict exists between the Eleventh Circuit's decision and that of other federal courts, therefore, certiorari should be denied.

It is a well-established principle that although a trial judge has a duty to conduct the trial in a fair and impartial manner, the judge has wide discretion in managing the proceedings. In Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933), this Court recognized that the judge must often play an aggressive role in the trial in order to maintain control in the courtroom, rather than that of a passive spectator. The Eleventh Circuit gave recognition to this principle and expressly followed Quercia in rendering the decision below.

The record of the trial demonstrates that Mr. Gay was belligerent, disrespectful and nonresponsive throughout his testimony. To assure the continuation of an orderly and expedient trial, it was continually necessary for the court to

intercede in the proceedings and admonish the witness. In so doing, the trial court did not manifest any bias or prejudice against Mr. Gay. Judge Elliott was simply fulfilling his proper role as manager of the conduct and procedure of the trial.

The Eleventh Circuit Court of Appeals followed the guidelines set forth by this court and other federal courts of appeal and found that the trial judge's actions were within the bounds of permitted conduct. The Eleventh Circuit reviewed the record as a whole to reach that conclusion. Petitioner simply seeks a new forum to air its characterizations of the record. Petitioner's petition for writ of certiorari ought therefore be denied.

REASONS FOR DENYING WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE NO REASON EXISTS FOR THIS COURT TO EXERCISE ITS POWER OF SUPERVISION OVER THE FEDERAL JUDICIARY. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS AND THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

This case presents no issue for review by this Court as the Eleventh Circuit Court of Appeals correctly applied the plain error rule. The Eleventh Circuit provided petitioner Gay with opportunity for full appellate review of Gay's claims of partiality and stated as follows:

> We have considered the record as a whole, including the judge's charge to the jury, rather than focusing narrowly on instances of allegedly improper conduct referred to in briefs of counsel. Newman v. A.E. Staley Mfg. Co., 648 F.2d 330, 345 (5th Cir. Unit B

> 1981). We note at the outset that the testimony of Gay, called as plaintiff's first witness for the purpose of cross-examination, extended through 184 pages of the transcript and that his testimony alone accounted for 360 of the 1,120 pages of the trial testimony. We recognize how crucial his testimony and his credibility were to the defense. The judge's interjections were not directly denegrating as to either. Many of them did occur while Gay was on the stand or his counsel was illiciting testimony, but they were largely justified. The context in which the judge's remarks were made makes it clear that Gay displayed a pattern of evasiveness while on the stand, which mandated firm intervention by the Court. Understandably, the judge's remarks grew somewhat harsher as Gay persisted in his habit of evading questions or responding to simple questions with extended remarks tailored to his self-interest. . . . there was no plain error requiring a reversal.

[Emphasis Supplied]

Petitioner concedes that this was a lengthy trial and that appellate scrutiny requires review of the entire record as a

whole. (Petitioner's Brief, pp. 7, 16-17.) Yet, despite the Eleventh Circuit's clear rejection of these same contentions, petitioner seeks a second review from this Court. Petitioner is not entitled to a "second bite" of the appellate apple any more than petitioner is entitled to a "second bite" at trial.

Petitioner concedes that the Eleventh Circuit applied the correct standard for review and that each case turns on its own facts (Petitioner's Brief, pp. 13-14). Petitioner, however, persists in mischaracterizing and partially citing portions of transcript to demonstrate improper trial court conduct. Respondent believes, and demonstrated to the satisfaction of the Eleventh Circuit Court of Appeals, that these contentions are

wholly unsupported by the evidence. In fact, the Eleventh Circuit concluded that the trial court's conduct was justified. This Court's review of the trial and appellate courts' opinions would establish no new rule or standard of review but would only serve the dangerous and improper function of encouraging endless litigation over characterizations of transcript and argument by new counsel.[1]

---

[1] In his brief petitioner implies that trial and appellate counsel (as well as the trial judge) failed to properly perform their duties (Petitioner's brief at pp. 30-32, 38). It is noteworthy that different attorneys represented petitioner at the trial and appellate level, and yet new counsel represents petitioner on this petition for a writ of certiorari. In short, petitioner has expressed dissatisfaction with all elements of the trial. Respondent believes that this dissatisfaction arises from the result and does not provide a basis for a new trial or second appeal.

In short, as petitioner in fact concedes, the trial judge's comments do not meet the standard for reversal set forth in earlier opinions of this Court. (Petitioner's Brief, p. 36.) Rather, this case demonstrates the extent to which due process can delay a plaintiff's established right to recovery since petitioner has lost not only at trial but in post-trial motions, on appeal, and in motion for rehearing en banc. Litigation must conclude. Further, review in this case would serve only to encourage litigation without end and without regard to the underlying merits of the controversy as judged by a trial court and jury.

A. The Standard of Review Utilized by the Eleventh Circuit Court of Appeals in Rendering the Decision Below is Uniformly Accepted and Applied by all Federal Courts of Appeal.

The petitioner did not make objection to the trial court's comments at the time of trial which are now claimed to have been prejudicial. Petitioner concedes that the Eleventh Circuit Court of Appeals was therefore limited in its review to review for "plain error". Morreale v. Downing, 630 F.2d 286 (5th Cir. 1980).

The "plain error" standard of appellate review is uniformly recognized by the federal courts as the proper standard of review when no contemporaneous objection is made at the time of trial. Under the "plain error" standard, reversal is required only in those exceptional cases where the error has caused a "miscarriage of justice" by seriously affecting the "fairness, integrity or public reputation of judicial proceedings." See, e.g., Morris v.

Getscher, 708 F.2d 1306 (8th Cir. 1983); Rojas v. Richardson, 703 F.2d 186 (5th Cir. 1983).

Petitioner relies almost exclusively on the decisions of the Second Circuit Court of Appeals to support his contention that the decision of the Eleventh Circuit is in conflict with the decisions of other federal courts of appeal. However, if these decisions are examined in the context in which they are rendered, it is readily apparent that no conflict exists.

All of the Second Circuit decisions relied upon by petitioner to support its claim of a conflict are criminal, not civil cases. The Second Circuit has repeated emphasized that although the "plain error" language is utilized by the Courts in both types of cases, the standard of review is more narrowly

defined in a civil suit as "fundamental error." In the case of Modave v. Long Island Jewish Medical Center, 501 F.2d 1065, 1072 (2nd Cir. 1974), the Court stated:

> Preliminarily it is worth noting that the "plain error" phrase is found in F.R.Cr.P. 52, not in the civil rules. Except perhaps for errors that could not have been corrected on proper objection, the doctrine applicable in civil cases is the more limited one of "fundamental error", see New York Central R.R. v. Johnson, 279 U.S. 310, 318-319, 49 S.Ct. 300, 73 L.Ed. 706 (1929) - an error so serious and flagrant that it goes to the very integrity of the trial. (Citations omitted)" [Emphasis supplied]

See also Brenner v. World Boxing Council, 675 F.2d 445 (2nd Cir. 1982), certiorari denied 103 S.Ct. 79 (1982).

Petitioner has not cited a single civil case involving similar conduct by a trial judge which resulted in a reversal

by a court of appeals. Indeed, petitioner concedes that the cases petitioner relies upon involve much more "egregious circumstances than the record here would reveal," in addition to involving a less stringent standard of review. (Petitioners Brief, p. 27). Furthermore, the cases and statutes relied upon by petitioner are completely inapplicable to the circumstances present in the instant case.

For example, petitioner relies upon the case of United States v. De Sisto, 289 F.2d 33 (2nd Cir. 1961). (Petitioner's Brief, p. 26). De Sisto involved an appeal from a conviction for obstruction of interstate or foreign commerce. On appeal, the defendant argued that the trial judge's conduct was prejudicial and deprived him of a fair trial. The Second

Circuit Court of Appeals revised and remanded the trial court's decision on the grounds that the judge's conduct conveyed to the jury an impression of partiality.

Although De Sisto involved a reversal by an appellate court for prejudicial conduct by a trial judge, the conduct of the judge was very different in character from that of Judge Elliott in the instant case. In De Sisto, the Second Circuit found that the judge's conduct in extensively questioning witnesses and the defendant himself and in repeatedly expressing outright disbelief in the defendant's alibi created too strong an impression of the court's belief in the defendant's probable guilt.

In the case at bar, none of the conduct referred to by defendant amounted to a direct statement of the Court's

disbelief in the defendant's position. Instead, all of the judge's conduct represented an effort to maintain control of the courtroom and to assist the jury in understanding the evidence, which the court in De Sisto recognized is a proper function of the trial judge.

A second example of petitioner's use of improper and inapplicable legal support is petitioner's reliance upon the federal disqualification statute, 28 U.S.C. section 455 (a) (Petitioner's Brief, p. 39), which states:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Generally, this statute is properly used by a party to a case in conjunction with 28 U.S.C. § 144 to obtain the disqualification of a judge before the

trial. Only in rare instances is it applied to disqualification during trial. This statute does not apply to claims of bias developing during trial which are caused by a party's conduct and the evidence, as petitioner contends in the instant case. See, e.g., United States v. Johnson, 658 F.2d 1176 (7th Cir. 1981); United States v. Haldeman, 559 F.2d 31 (D.C.Cir. 1976), certiorari denied 97 S.Ct. 2641 (1977).

In his brief, petitioner artificially creates a conflict by relying on factually distinguishable cases and statutes and involving a broader standard of review than was properly applied by the Eleventh Circuit Court of Appeals in the case at bar. The Eleventh Circuit Court of Appeals utilized the standard of review uniformly accepted and applied by all

federal courts of appeal when presented with circumstances similar to those in the case at bar. The appellate court applied the "plain error" doctrine to the record as a whole and concluded that reversal was not appropriate. No conflict exists between the Eleventh Circuit's decision and that of other federal courts, therefore, certiorari should be denied.

B. The Eleventh Circuit Court of Appeals Correctly Followed Guidelines of this Court by Finding the Trial Court's Conduct was Necessary and Appropriate.

Petitioner contends that this Court should exercise its supervisory powers over the federal judiciary in order to "re-establish uniform guidelines for courts of appeal to implement the requirement of judicial impartiality." (Petitioner's Brief, p. 10). However, the

guidelines set forth by this Court are clear, and have consistently and uniformly been implemented by the federal courts. These guidelines were applied to the record as a whole by the Eleventh Circuit Court of Appeals, which properly concluded that the trial judge's actions were within his authority to govern the trial. The mere fact of receiving an unfavorable decision provides no basis for this Court to reiterate longstanding principles that were applied by the Eleventh Circuit.

It is a well-established principle that although a trial judge has a duty to conduct the trial in a fair and impartial manner, the judge has wide discretion in managing the proceedings. United States v. Hawkins, 661 F.2d 436 (5th Cir. 1981). In Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321 (1933),

this Court fully reviewed the trial judge's role and stated: "in a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." This Court thereby recognized that the judge must play an aggressive role in the trial in order to maintain control in the courtroom, rather than that of a passive spectator. The Eleventh Circuit Court of Appeals gave recognition to this principle and expressly followed Quercia in rendering the decision below.

Petitioner recognizes that when a question of judicial impartiality is raised, "each case necessarily turns on its own facts." United States v. Socony-Vacuum Oil Co., Inc., et. al., 310 U.S.

150, 240 (1940). (Petitioner's Brief, p. 14). The question of impartiality necessarily requires an examination of the record as a whole because it is impossible for this Court, or any court, to identify specific conduct which requires a reversal without consideration of the entire trial. Indeed, it is vital to consider the record as a whole to determine the context in which the judge's conduct took place. This Court stated in Glasser v. United States, 315 U.S. 60, 128 (1942), on reviewing a claim of prejudicial conduct by the trial judge:

> Perhaps the Court did not attain at all times that thoroughgoing impartiality which is the ideal, but our examination of the record as a whole leads to the conclusion that the substantial rights of the petitioners were not affected. The trial was long and the incidents relied on by petitioner's few. We must guard against the magnification on appeal of instances which were of little importance in their

setting. Cf. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 240, 60 S.Ct. 811, 852, 84 L.Ed. 1129; Goldstein v. United States, 8 Cir., 63 F.2d 609; United States v. Warren, 2 Cir., 120 F.2d 211.

Petitioner's brief inappropriately contains an argument on the merits of the case. Although consideration of granting a writ of certiorari does not include review of the merits, it is necessary to illustrate that petitioner's "incidents" are presented out of context and petitioner's conclusions are thus without merit.

For example, petitioner contends that, throughout the trial, Judge Elliott evidenced an attitude favorable to respondent's case in that he almost never interrupted the presentation of the respondent's case and was continually antagonistic to petitioner. This

contention is erroneous. There are numerous instances within the transcript where the trial judge interjected comments and admonishments to respondent's counsel and where he aided Mr. Gay with his testimony. (see, e.g.. T-258, lines 8-11; T-268, line 25; T-270, line 2; T-279, line 11; T-301, line 15, T-774, lines 11-13; T-787, 788).

The record of the trial demonstrates that Mr. Gay was belligerent, disrespectful and nonresponsive throughout his testimony. To assure the continuation of an orderly and expedient trial it was continually necessary for the court to intercede in the proceedings and admonish the witness. In so doing, the trial court did not manifest any bias or prejudice

against Mr. Gay. Judge Elliott was simply fulfilling his proper role as manager of the conduct and procedure of the trial.

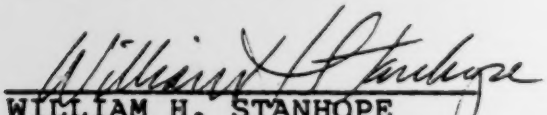
The Eleventh Circuit Court of Appeals followed the guidelines set forth by this Court and found that the trial judge's actions were within the bounds of permitted conduct. The Eleventh Circuit reviewed the record as a whole to reach that conclusion.

CONCLUSION

The Eleventh Circuit Court of Appeals properly applied the "plain error" standard to the record of the entire trial. In doing so, the appellate court followed the guidelines used by other federal appellate courts. Petitioner simply seeks a new forum to air its

characterizations of the record. Petitioner's petition for writ of certiorari ought therefore be denied.

Respectfully submitted,



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